In the Supreme Court of the United States.

GEORGE W. ALLEN, as Administrator, etc.,
Plaintiff in Error,

vs.

FRANK M. ARGUIMBAU, as Surviving Partner, etc.,
Defendant in Error.

ON WRIT OF ERROR TO THE SUPREME COURT OF FLORIDA.

Answer to Motion to Dismiss or Affirm the Jurisdiction.

This was an action upon two promissory notes for twenty-five hundred dollars ($2,500) each, executed to Horace R. Kelly, endorsed by Kelly to the Horace R. Kelly & Company, Limited, and by them endorsed to the plaintiff. Three different sets of pleas were filed to the declaration to which demurrers were successively sustained. One of the defenses presented was that the notes were given in consideration of an agreement on the part of the payee thereof to maintain and operate a cigar factory at Key West, Florida, for the period of three years and that the said payee wholly failed and refused to perform his said agreement, of which

the subsequent endorsees of the notes had notice at the time they received them (Rec., 18).

This plea, of course, does not present a Federal question.

(a) The first three pleas filed March 24th, 1900, allege that these notes were given solely in consideration of the agreement and promise of Horace R. Kelly, the payee, whereby he undertook that cigars should be manufactured at Key West, Florida, and in no other place, according to the terms of a certain contract between himself and the Havanna and Key West Cigar Company, Limited, whereby the latter was to manufacture cigars at its factory in Key West to fill all orders for cigars secured by the Horace R. Kelly Company (a corporation to be formed by the said Horace R. Kelly), and whereby the said cigars were to be moved from the said factory and disposed of contrary to the United States Revenue Laws, each of the three pleas specifying a distinct violation of the laws of the United States, which the performance of the agreement would have involved, and which will hereafter be stated in detail.

These pleas were separately demurred to and the demurrers were sustained, and these rulings were each assigned for error (Rec., 28).

Subsequently on February 2d, 1903, the defendant filed his amended pleas to the declaration and in the fourth, fifth and sixth of such pleas set up the same defenses in substance, coupled with an allegation that at the time of the endorsement each of the endorsees had notice of the contract, which formed the consideration for the notes (Rec., 19, 20, 21). These pleas were in turn demurred to, and the demurrer was sustained, and these rulings also were assigned for error (Rec., 22, 23, 24, 28).

The provisions of the Revised Statute in question are as follows:

Section 3390 requires every manufacturer to "enter daily in a book, the form of which shall be prescribed by the Commissioner of Internal Revenue, an accurate

account of all the articles aforesaid purchased by him, the quality of leaf tobacco, cigars, stems, or cigar boxes of whatever description, manufactured, sold, consumed, or removed for consumption, or sale, or removed from the place of manufacture; and shall, on or before the tenth day of each and every month, furnish to the collector of the district a true and accurate abstract from such book, verified by his oath, of all such purchases, sales and removals made during the month next preceding. In case of refusal or wilful neglect to deliver the inventory or keep the account, or furnish the abstract aforesaid, he shall be fined not less than five hundred dollars, nor more than five thousand dollars, and imprisoned not less than six months nor more than three years."

Section 3393 requires every manufacturer to paste on each box a label "on which shall be printed, together with the proprietor's or manufacturer's name, the number of the manufactory, and the district or state in which it is situated, these words: 'Notice:—The manufacturer of the cigars herein contained has complied with all the requirements of law. Every person is cautioned under the penalties of law not to use this box for cigars again.' Every manufacturer of cigars who neglects to affix such label to any box containing cigars made by or for him, or sold or offered for sale by or for him, and every person who removes any such label, so affixed, from any such box, shall be fined fifty dollars for each box in respect to which such offense is committed."

Section 3397 provides that "whenever any cigars are removed from any manufactory or place where cigars are made, without being packed in boxes as required by the provisions of this chapter, or without the proper stamp thereon denoting the tax, or without burning into each box with a branding iron the number of the cigars contained therein, the name of the manufacturer and the number of the district and state * * * or are sold or offered for sale not properly boxed and stamped, they shall be forfeited to the United States. And every person who commits any of the above described offenses shall be fined for each such offense, not less than one hundred dollars nor more than two years."

Section 3397 further provides for the punishment of any person "who removes from the place of manufacture any cigars not properly boxed and stamped as required by law" by fine not less than one hundred

dollars and not more than one thousand dollars and imprisonment not less than six months and not more than three years, and declares the offense a felony.

The defendant claimed that a right construction of these sections or the revised statutes invalidated these notes, and the decisions of the State Court was against the immunity from liability so claimed.

There are many decisions in this Court which sustain the jurisdiction in this case, and it will be sufficient to cite a few of them in which the analogy is perfect.

Dubuque & Sioux City R. R. Co. vs. Richmond, 15 Wallace, 3.
Railway Co. vs. Renicke, 102 U. S., 180.
Anderson vs. Carkins, 135 U. S., 483.
McCormick vs. Bank, 165 U. S. Text, 545, 546.

In 1895 a constitutional amendment was adopted in Florida for the purpose of relieving the congested condition of the docket of the Supreme Court, the effect of which was to dispense with the necessity of opinions, and ever since its adoption it has been the practice of the Court to render no opinion in cases of affirmance, hence no opinion accompanies the record in this case.

But the record conclusively shows that the Federal question was passed on by the Supreme Court of Florida, and upon the merits.

This question is raised by the first, second and third amended pleas filed March 24th, 1900, and by the fourth, fifth and sixth amended pleas filed February 2d, 1903 (Rec., 9, 10, 19, 20, 21).

These pleas were demurred to on grounds which made it absolutely necessary for the Court to determine the effect of the Federal Statute on the subject matter of this action. The pleas and the grounds of demurrer were such that it was impossible for the Court to have given judgment except upon the merits of the question presented.

See the demurrers and judgments therein (Rec., 15, 16, 17, 18, 22, 23).

Also the assignments of error, predicated on these rulings (Rec., 28).

The record likewise contains a certificate of the Chief Justice in the following terms (Printed Transcript, p. 38).

"And the judgment of the Supreme Court of the State of Florida upon which the said Writ of Error is prayed in the several respects in which the same is questioned by the said assignment of errors, having denied to the plaintiff in error the validity of a defense or defenses asserted by him under the laws of the United States of America, and the said judgment of the Supreme Court of the State of Florida, in the several respects in which the same is questioned by the said Assignment of Error having proceeded on the *sole* ground that the respective defenses as pleaded—Asserted by the plaintiff in error under the laws of the United States of America should be denied and overruled, and the said judgment of the Supreme Court of Florida having denied to the plaintiff in error a title, right, privilege or immunity specially set up and claimed by the plaintiff in error under the statutes of the United States of America, it is ordered that a writ of error be and is hereby allowed to have reviewed in the Supreme Court of the United States the judgment of the said Supreme Court of the State of Florida," &c.

While this certificate could not give jurisdiction to this Court, it may be resorted to, in the absence of an opinion, to show that a Federal question, otherwise presented in the record, was actually passed upon by the Court.

Gulf, &c., R. Co. vs. Hewes, 183 U. S., 66.

(*b*) With respect to the criticism leveled at the form of the assignment of errors in the State Court, which merely asserted error in sustaining the respective demurrers to the respective pleas, we desire to state that this form of assignment is the one invariably used in

Florida and always deemed sufficient by the Supreme Court of the State.

Little vs. Bradley, 43 Florida Text, 407.
F. C. & P. R. Co. vs. Ashmore, 43 Florida Text, 276, *et seq.*
L. & N. R. Co. vs. Gibson, 43 Florida, 415.

Presumably, however, it would be sufficient under the most technical practice to assign as error that the Court erred in *sustaining* a demurrer to a plea, thereby adjudicating that the plea constituted no defense to the action.

The purpose of assignments of error is to specify the errors committed, and it is highly improper to make the assignments of error serve the purpose of a brief, by incorporating into them the *reasons* or arguments which support the sufficiency of the objections made to the rulings specified as error.

Atchison, &c., R. R. Co. vs. Myers, 22 C. C. A., 268; s. c., 76 Fed. Rep., 443.

The Merits.

(a) Concisely expressed, the substance of each plea was that the consideration for the notes was the payee's undertaking that cigars should be manufactured in accordance with a certain contract, violating certain provisions of the Federal statutes, to be entered into between Horace R. Kelly & Company and the Havana and Key West Cigar Company, Limited. In its last analysis, the undertaking was that cigars should be manufactured in violation of law, viz., in accordance with an agreement which violated the law.

This contract, if carried out, would have violated the express provisions of the law. It would have embarrassed the Revenue officers in collecting the public revenue, and would probably have defeated the collection of lawful taxes due the Government. Such would have been the natural tendency of the performance of

the contract, and the parties are presumed to have intended the natural effect of their proposed acts.

The demurrer confesses the purpose to perform the acts specified, and it likewise confesses the *intent* to accomplish the illegal object which was the natural effect of performing the acts in question.

Bank of U. S. vs. Owen, 2 Peters, Text 527.

This contract contemplated a continuous violation of the Revised Statutes, and in determining the effect of such a contract, we set out with a presumption against its validity.

"When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void."

Harris vs. Runnels, 12 Howard, Text 84.
Miller vs. Ammon 145 U. S., Text 426, 427.
In re Pittock, 2 Sawyer, 416.
15 Amer. & Eng. Ency. of Law, 939.

In many cases this presumption is rebutted by some circumstance which indicates a contrary intent, but there is nothing of the kind in this instance. On the contrary, an examination of the statute *confirms the presumption*. Thus, the penalties are recurrent in each case, which is indicative of an intent to avoid all contracts in derogation of the statute.

Anson on Contracts, 286.
Benjamin on Sales, 528 (Bennet's Ed.).
Clark on Contracts, 387.

Section 3397 provides that a failure to comply with the provisions of that section shall constitute a felony.

This, too, indicates an intent to nullify all acts or contracts which contemplate the breach of the statute, and the possible degradation of a citizen to the condition of a felon.

Anderson vs. Carkins, 135 U. S., Text 489.
Haggerty vs. St. L., Ice Mfg. Co., 143 Mo., 238.

"Agreements, obligations and securities given as the price for the commission of a public crime, or for the violation of a public law, or for the omission of a public duty are deemed incapable of enforcement."

Merchants Ins. Co. vs. Addison and others, 9 Robinson, 490.

In Youngblood vs. Bermingham Trust & Savings Co., 95 Alabama, 524, that Court said: "No rights can spring from or be rested on an act in the performance of which a criminal penalty is incurred and all contracts which are made in violation of a penal statute are as absolutely void as if the law had in so many words declared them to be so."

See, also,

Executors of Cambioso vs. Assignee of Maffett, 2 Washington C. C. Repts., 103.
15 Am. & Eng. Ency. of Law, 939.

In the case of Creekmore vs. Chetwood, 70 Kentucky, 317, it was held that there could be no recovery on a note given in consideration of the sale of a barrel of liquor, which was made in Tennessee and smuggled into Kentucky by the plaintiff in violation of the revenue laws of the United States; and that the brandy not having been inspected nor any tax having been paid thereon; and the barrels containing it not having been branded as required by law, the contract was against public policy and void.

There is at least one case in which it was held that the penalty is a species of license money, and that the exaction thereof satisfied the statute.

Hill vs. Smith, 1 Morr. (Iowa), 70.

A doctrine which would convert all such prohibitory statutes into regulations for commuting the right of offending into money, to use the language of a learned author.

It is apparent that Congress never intended to apply this principle to section 3397, since every box of cigars which is not marked or branded as required

by law is to be forfeited and every such offense is punishable by imprisonment.

As related to this branch of the subject we quote the language of Mr. Bishop, quoted with approval in Gibbs vs. Baltimore Gas Co., 130 U. S., Text 410:

"The law cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids, nor can it give effect to any agreement, the making whereof was an act violating the law. So that in short, all stipulations to overturn or in evasion of what the law has established; all promises interfering with the workings of the machinery of the government in any of its departments, or obstructing its officers in their official acts or corrupting them; all detrimental to the public order and public good, in such manner and degree as the decisions of the Courts have defined; all made to promote what a statute has declared to be wrong are void."

Bishop on Contracts, Sect. 549.
Gibbs vs. Baltimore Gas Co., 130 U. S., Text 410.

There can be no doubt the statute avoided the contract which was the consideration for these notes.

Miller vs. Ammon, 145 U. S., 421.
Bank of U. S. vs. Owen, 2 Peters, 527.
Church vs. Proctor, 66 Fed. Rep., 240.

The execution of the notes makes no difference, the consideration therefor being tainted with illegality.

Brinn vs. Tarkington, 3 Wall., 377.
Embry vs. Jennison, 131 U. S., 336.
Pollock on Contracts, 327.
11 Chitty on Contracts, 972.

(b) The defendant having impeached the consideration of the notes by plea, the Florida practice required the plaintiff to offer in evidence the agreement out of which the notes grew and which is set up in the pleas. And, unless that contract disclosed that there was a

legal consideration for the notes, the defendant could not recover.

Smith vs. Le Vesque, 25 Fla., 464.

And the plaintiff would not be permitted to refer to that portion of the contract which contained legal provisions and ask the Court to close its eyes to the illegal parts.

McMullen vs. Hoffman, 174 U. S. Text, 656.

The contract between Kelly, the payee of the notes, and the makers was that he would procure cigars to be manufactured at Key West in accordance with the terms of a certain other contract, which provided for a violation of the revenue laws. It was an agreement entered into for the purpose of carrying into effect, or assisting in the execution of an illegal contract, and was void.

"Where a contract grows out of, or is connected with, an illegal act, the Court will not lend its aid to enforce it, and if it be in fact connected with the illegal transaction, it is tainted with the illegality of the transaction from which it sprung."

Barton vs. Port Jackson, &c., Co., 17 Barbour, 397.
Armstrong vs. Toler, 11 Wheaton, 258.
DeWitt vs. Brisbone, 16 N. Y., 508.
Gray vs. Hook, 4 N. Y., 449.

Where a contract grows immediately out of and is connected with a prior illegal contract, the illegality of such prior contract will enter into the new contract, and render it illegal.

15 Am. & Eng. Ency., 992,
De Bignis vs. Armistead, 10 Bing., 107.
Aubert vs. Maze, 2 B. & P., 371.

And the rule has been broadly laid down that if the connection between the original illegal contract and the new contract can be traced, if the latter is con-

nected with and grows out of the former, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of a recovery. Repeating the void promise cannot give validity to it.

Comstock vs. Draper, 1 Mich., 481; 53 Amer. Decis., 78.
Wheeler vs. Russell, 17 Mass., 258.

It is argued that the chief inducement to the execution of the notes was the *manufacture* of the cigars at Key West, and that the makers of the notes were not concerned with that part of the contract which provided that the cigars when manufactured should be disposed of contrary to the revenue laws.

But the defense is allowed for the sake of the vindication of the law, and not for the defendant's benefit.

Myers vs. Meinrath, 101 Mass., 366.

"Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. * * *

"The principle to be extracted from all the cases is that the law will not lend its support to a claim founded on its violation."

Oscanyan vs. Arms Co., 103 U. S., 268.

"In cases of this kind the maxim is *Potior est Conditio defendentis.*"

McMullen vs. Hoffman, 174 U. S., 654.

Kelly, the payee of the note, was not content to contract merely for the manufacture of cigars at Key West, but to procure them to be manufactured in accordance with the terms of a certain other contract which he had theretofore entered into. The Court cannot, therefore, discard terms which Kelly insisted upon going into the contract, and the use to be made of these cigars after they were manufactured must be

taken into consideration, and it is that illegal purpose, encouraged and assisted by the execution of these notes, that renders them void.

"Where it is part of the contract that an unlawful object was intended, and part of the common purpose that the contract, and the things done under it should be used to promote an unlawful purpose, such contract cannot be enforced."

Materne vs. Horwitz, 50 N. Y. Superior Court.
Reports 41, Affirmed in 101 N. Y., 469.
Church vs. Proctor, 66 Fed. Rep., 245 (Circt. Ct. Appeals, 1st Cir.).

"If the subject matter or object of an agreement is such that its performance would consist in an act or omission so forbidden (by law), or be so connected therewith as to be in substance part of the same transaction, the Courts will not enforce it."

Clark on Contracts, 256.

The demurrers admitted that the sole consideration for the notes was the payee's promise to organize a corporation to contract for the manufacture of cigars in violation of the federal statutes, and this promise, on the present record, is certainly entire and inseparable. The Court cannot separate it into distinct separable elements, legal and illegal, upon the admissions of the demurrers, whatever it might be able to do, if an issue had been raised, and the entire evidence brought before the Court.

The following would be an analogous case. Suppose a tobacco famine had occurred in Key West. A approaches B., a cigar manufacturer, and says that if the latter will give the former his note to assist in raising funds, the former will procure a contract to be made between C and D whereby D shall smuggle tobacco to Key West. Could any one contend that payment of the note could be enforced? And the analogy is perfect between the cases.

Even if it were true that the defendant's intestate

received the same benefit, as the defendant in error contends, it would make no difference.

McMullen vs. Hoffman, 174 U. S., 639.
Wheeler vs. Russell, 17 Mass., 258.
Daniels v. Barney, 22 Ind., 207.
Dudley v. Collier, 6 So. Rep., 394.
Dillon vs. Allen, 46 Iowa, 299.

(*c*) The law must be applied so as to obtain a mutuality of remedies. No action could be maintained against Kelly for a failure to carry out his contract, since he promised to do what was unlawful.

Clark on Contracts, 255, 256.
Mitchell vs. Smith, 1 Binnie, 117.
Church vs. Proctor, 66 Fed., 244.
Materne vs. Horwitz, 101 N. Y., 471.

And consequently neither Kelly nor his endorsees can maintain an action on the notes.

"The remedies must be mutual or not at all."

Mitchell vs. Smith, 1 Binnie, 117.

(*d*) It is suggested by counsel for the defendant in error that the doctrine of *mala in se* or *mala prohibita* has an application here.

Chancellor KENT has this to say about that doctrine:

"The distinction between statutory offences, which are *mala prohibita* only, or *mala in se*, is now exploded, and a breach of the statute law in either case is equally unlawful, and equally a breach of duty; and no agreement founded on the contemplation of either class of offences, will be enforced at law or in equity."

1 Kent's Com., 519 (7th ed.).
U. S. Bank vs. Owens, 2 Peters, 527.
Binsley vs. Bignold, 5 Barn. & Ald., 341.
Pratt vs. Short. 79 N. Y., 445.

"Every moral man is as much bound to obey the civil law of the land as the law of nature."

ROOKE, J., in Aubert vs. Maze, 2 Bos. & Pull. Text, 375.

Nor is there any different rule in the case of Revenue Statutes from what controls in other cases.

Harris vs. Runnels, 12 Howard, 84.
Cope vs. Rowlands, 2 m. & W., 157.
Smith vs. Mowhood, 14 M. & W., 461.

The motion to dismiss or affirm should be denied.

Respectfully submitted,

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